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IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

KAISER STEEL CORPORATION,
Petitioner,
v.
JULIUS MULLINS, *et al.*,
Respondents.

BRIEF AMICUS CURIAE OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS IN SUPPORT OF RESPONDENTS

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BRIEF AMICUS CURIAE OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS IN SUPPORT OF RESPONDENTS

The National Coordinating Committee for Multiemployer Plans submits this brief *amicus curiae* in support of Respondents. Copies of letters written by counsel for Petitioner and Respondents, granting the parties' consent to this submission, are on file with the Clerk of the Court.

INTEREST OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS

The National Coordinating Committee for Multiemployer Plans ("NCCMP") is a non-profit, tax-exempt organization established after Congress enacted the Employee Retirement Income Security Act of 1974.[1] NCCMP consists of representatives of approximately one hundred

[1] 29 U.S.C. § 1001, *et seq.*, hereinafter referred to as "ERISA".

thirty-five pension and welfare plans, or their sponsors, through which, in the aggregate, the interests of approximately three million persons are represented. On behalf of its affiliated multiemployer plans and their participants and beneficiaries, the NCCMP is actively engaged in monitoring the development—legislative, administrative, and judicial—of the laws which relate to the structuring and administration of multiemployer pension and welfare plans. Because of the broad range of experience represented among its constituent organizations, the NCCMP believes that it is well qualified to inform appropriate governmental authorities regarding the problems facing the sponsors, trustees and administrators of multiemployer plans.[2]

The NCCMP is concerned that, if adopted by this Court, the position advocated in the courts below by Petitioner Kaiser Steel Corporation ("Kaiser") would necessarily and inevitably result in a significant erosion of carefully designed, time-tested safeguards of pension and welfare funds' neutrality in labor-management disputes. As recently noted by this Court in *National Labor Relations Board* v. *Amax Coal Co.*, —— U.S. ——, 49 U.S.L.W. 4880 (1981), Congress took great care in enacting section 302(c)(5) of the Labor-Management Relations Act of 1947 (hereinafter "LMRA")[3] to insure that moneys contributed to collectively bargained, jointly-trusteed pension and welfare trust funds would be used *solely* to provide benefits to participants and their beneficiaries, and to foreclose the possibility that such funds

[2] The NCCMP has been recognized as having had a "significant impact" on the development of the Multiemployer Pension Plan Amendments Act of 1980, Public Law 96-364, 94 Stat. 1208-1311 (1980) by the Senate co-sponsors of that legislation. See 126 Cong. Rec. S 9835 (daily ed., July 24, 1980); 126 Cong. Rec. S 10100 (daily ed., July 29, 1980). The NCCMP also appeared before this Court as an *amicus curiae* in *Daniel* v. *International Brotherhood of Teamsters*, 439 U.S. 551 (1979).

[3] 29 U.S.C. § 186(c)(5).

could themselves become instruments for the advancement of the partisan interests of either unions or employers. In enacting the ERISA fiduciary responsibility requirements in 1974,[4] Congress reaffirmed its earlier intentions and reinforced the insulation of pension and welfare funds from employer and union interests. *Amax Coal Co., supra*, 49 U.S.L.W. at 4883.

Contrary to that legally mandated neutrality of pension and welfare funds, Kaiser seeks to force upon Respondents[5] the role of surrogate to the United Mine Workers of America (the "Union") and, thereby, compel the Trustees to commit the resources of the Funds to a full-scale defense of the Union in what we believe is plainly a prototypical union-employer fight. The NCCMP believes that the result Kaiser seeks would impose substantial burdens on many jointly-trusteed funds, and would seriously interfere with the ability of those funds and their trustees to fulfill their legitimate, legally-mandated responsibilities to the funds' participants and beneficiaries.

The NCCMP is further concerned that adoption of the position advanced by Kaiser would require repudiation of the long-standing rule of federal labor relations law that employee pension and welfare funds enjoy a special third-party beneficiary status which precludes employers from asserting against such funds legal claims and defenses concerning or arising out of their relationships with the unions co-sponsoring the funds. That rule, first recognized by this Court in *Lewis* v. *Benedict Coal Co.*, 361 U.S. 459 (1960), was recently reaffirmed and codified by the Congress in the Multiemployer Pension Plan Amendments Act of 1980, Public Law 96-364, 94 Stat. 1208-1311 (1980) (hereinafter referred to as

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[4] 29 U.S.C. §§ 1101-1109.

[5] Respondents are the Trustees of the United Mine Workers of America Health and Retirement Funds.

"MPPAA"). The legislative history of the MPPAA clearly demonstrates that Congress considered it critical to the purpose of that legislation[6] and to "sound national pension policy" that employers not be permitted to convert simple collection cases brought by fund trustees into lengthy, complex and costly litigation involving claims and defenses solely related to the union-employer relationship. It is to elaborate these concerns and to place them before the Court that the NCCMP sought permission to file this brief.

SUMMARY OF ARGUMENT

Petitioner Kaiser Steel Corporation asks this Court to fashion a rule which would permit employers to ignore contractual commitments to contribute to jointly-trusteed employee pension and welfare funds, and to require that the funds' joint trustees assume responsibility for defending and advocating various collective bargaining interests of the union in litigation in order to establish the funds' entitlement to the contributions the employer had agreed to make. Such a rule is necessary, says Kaiser, in order to avoid enlisting the power and authority of the courts in the enforcement of "illegal" contracts, and is prevented neither by generally accepted principles of contract and antitrust law, nor by the doctrines of preemption and primary jurisdiction developed under the National Labor Relations Act.

Both courts below refused to permit Kaiser to interpose the defenses of illegality which it sought to raise against the Respondent Trustees. In seeking reversal of those rulings here, Kaiser invites the Court to view the

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[6] As noted by this Court in *National Labor Relations Board* v. *Amax Coal Co., supra*, 49 U.S.L.W. at 4885, n. 22, Congress sought, by enacting the MPPAA, to "enhance the financial stability of multiemployer pension plans" and "to foster the maintenance and growth" of such plans.

Trustees, who brought the suit, and the United Mine Workers of America, the union cosponsor of the trust, as if they were identical.

To accept Kaiser's hypothesis, however, would require the Court to disregard the nearly thirty-five years during which unions and employers have worked, pursuant to the clear mandate of § 302(c)(5) of the LMRA, to structure and operate jointly-trusteed employee welfare funds so that they would remain strictly neutral in the day-to-day, year-to-year give and take of labor relations. It was Congress' firm judgment in 1947 that such funds must be removed from the field of "industrial combat". That Congressional judgment has never changed, and has on several occasions been reaffirmed. This Court has had occasion as recently as last term to acknowledge and affirm the importance, in the overall scheme of federal labor relations law, of recognizing and maintaining that neutrality. *Amax Coal Company, supra.*

The NCCMP believes that proper recognition of the particular role assigned by Congress to funds like Respondents' is the central principle controlling disposition of this case. To obscure or ignore that neutral role, as Kaiser urges the Court to do, will have the inevitable effect of eroding it. Kaiser proposes to force jointly-trusteed employee welfare funds vigorously to join issue, on behalf of unions and against employers, on a wide range of labor-management collective bargaining disputes. This radical reversal of such funds' carefully-crafted, tightly-constrained neutrality is clearly contrary to the unmistakable intent of Congress. Moreover, this drastic change finds no support in any court decision, and is, in any event, wholly unnecessary to accommodate any legitimate competing or countervailing employer interest. The position urged by Kaiser must be squarely rejected, and the decision of the Court of Appeals affirmed.

ARGUMENT

I. JOINT TRUSTEES OF COLLECTIVELY BARGAINED EMPLOYEE PENSION AND WELFARE FUNDS ARE PROHIBITED FROM ACTING AS ADVOCATES ON BEHALF OF THE PARTISAN INTERESTS OF THE UNION OR THE EMPLOYER.

This litigation began in the District Court for the District of Columbia as a simple collection case. Plaintiffs (Respondents here) are the three Trustees [7] who together are responsible for the administration of the United Mine Workers of America Health and Retirement Funds ("the Funds"). They sought a judgment against the Kaiser Steel Corporation for the difference between the amount of money which Kaiser had agreed to contribute to the Funds during the term of the 1974 National Bituminous Coal Wage Agreement ("NBCWA"), and the amount Kaiser had, in fact, paid during that time. Kaiser's delinquency represented royalties it had agreed to pay on coal purchased from other coal producers for its own use or for resale.

In its defense against the Trustees' claim, Kaiser did *not* deny that it was a party to the 1974 NBCWA, or that the Agreement contained the contribution requirements upon which the Trustees sued. Nor did Kaiser claim that it had not received the miners' labor for which it bargained in the 1974 Agreement, or that it had not purchased the coal for which the Trustees sought to collect royalty payments. Instead, recognizing that it had

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[7] The Union and the Employers' Association each designate one trustee, and those two select the third. This trustee structure thus precisely complies with the requirement of § 302(c)(5)(B) of the Labor-Management Relations Act, 29 U.S.C. § 186(c)(5)(B), that "employees and employers [be] equally represented in the administration of such fund, together with such neutral persons as the representatives . . . may agree upon . . . ."

no straightforward defense to the Trustees' delinquency collection action, Kaiser alleged that its contractual obligation to make royalty payments to the Funds for purchased coal could not be enforced *by the Funds* because, in negotiating the purchase-of-coal clause in the 1974 NBCWA, the *Union* had violated Sections 1 and 2 of the Sherman Antitrust Act [8] and Section 8(e) of the National Labor Relations Act.[9]

Both courts below held that Kaiser was not entitled to interpose those defenses in this action by the Trustees. If this Court disagrees, however, the Trustees' right to recover Kaiser's delinquent purchased coal royalties will become contingent upon their ability to prove that no actionable violation of either the Sherman Act or the National Labor Relations Act arises as a result of the Union's negotiation of the purchase-of-coal royalty payment clause. That effort, in turn, will inevitably require the Trustees to engage in vigorous advocacy of the Union's right under the antitrust and labor laws to conduct its collective bargaining relationship with employers as it sees fit.

The intimate, partisan involvement by Trustees in this adversary attempt to sort out the relationship between the UMWA and the employers would, in the view of the NCCMP, be directly antithetical to Congressional mandates of strict neutrality and singleness of purpose under which all such trustees must operate. For these reasons, no defenses such as Kaiser sought to raise below should be permitted in trustee actions to collect delinquent employer contributions.

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[8] 15 U.S.C. §§ 1, 2.

[9] 29 U.S.C. § 158(e).

II. LITIGATION OF KAISER'S ILLEGALITY DEFENSE WOULD REQUIRE FUND TRUSTEES TO ADVOCATE PARTISAN POSITIONS IN UNION-EMPLOYER COLLECTIVE BARGAINING DISPUTES.

A. Trial of the Sherman Act Allegations Would Require Trustees To Defend Union Collective Bargaining Interests.

The task of harmonizing the facially contradictory mandates of the Sherman Act's prohibition against combinations which restrain trade, and the National Labor Relations Act's specific authorization and protection of concerted collective bargaining activity has been and continues to be both difficult and complicated.[10] The nature of the issues presented in any such case, moreover, makes it inevitable that, should pension or welfare fund trustees find themselves forced to litigate these issues, they will be compelled in doing so to assume the role of advocate for the involved union. The history of antitrust litigation in the coal mining industry itself makes it abundantly clear that challenges such as Kaiser attempts to raise here are merely the most recent manifestations of a years-long battle between the United Mine Workers and employers in that industry.[11] When that battle has previously resulted in litigation in which a term of a collective bargaining agreement has been challenged as violative of the Sherman Act, defense of the challenged clause has invariably required defense of the union's effort to enlarge upon or expand the limits of permissible collective bargaining. *See United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965). Thus the task falling to a

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[10] See generally St. Antoine, *Connell: Antitrust Law at the Expense of Labor Law*, 62 Va. L. Rev. 603 (1976).

[11] Kaiser itself characterizes this case as one arising "out of a coal industry labor dispute that is decades old[,]" (Pet. Brief, p. 3), and which has "led to almost continuous litigation before the federal courts and the National Labor Relations Board. . . ." (Pet. Brief, p. 5).

party charged with defending a collective bargaining agreement against a Sherman Act challenge is to demonstrate that the disputed provision

> is so intimately related to wages, hours and working conditions that the unions' successful attempt to obtain that provision through bona fide, arm's length bargaining in pursuit of their own labor union policies and not at the behest or in combination with nonlabor groups, [that it] falls within the protection of the national labor policy and is therefore exempt from the Sherman Act (footnote omitted).

Local 189, Meat Cutters Union v. *Jewel Tea Company*, 381 U.S. 676, 689-690 (1965) (Opinion of White, J.). Any litigation of such a challenge necessarily requires an exploration of the context in which the disputed clause was proposed and agreed upon, and will frequently require inquiry concerning, and determination of, the union's objectives in seeking the clause.[12] Such controveries are, in the words of Justice Brandeis, extensions of the ongoing process in which "industrial combatants . . . push their struggle to the limits of the justification of self-interest. . . ." *Duplex Company* v. *Deering*, 254 U.S. 443, 488 (1921) (Brandeis, J., dissenting). It is, no doubt, wholly appropriate that, when challenged in court, the "industrial combatants" be required to defend the bargaining choices they have made and the negotiating tactics they have employed. However, unlike Kaiser, we think it is entirely inappropriate and clearly contrary to equally important, equally well defined public policy considerations to require that neutral pension fund trustees take up the partisan cause of one of the "combatants" in this process.

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[12] "[U]nder established precedents, the antitrust laws exempt agreements, whether primary or secondary, that are aimed at promoting union organization, as well as agreements that are aimed at eliminating competition over labor standards." St. Antoine, *supra*, 62 Va. L. Rev. at 622.

B. Trial Of the Unfair Labor Practice Allegations Would Require Trustees To Defend Union Collective Bargaining Interests.

Trial of Kaiser's defensive claim that the union committed a violation of Section 8(e) of the National Labor Relations Act, 29 U.S.C. § 158(e) by negotiating the 1974 "purchase-of-coal" clause would also require the Fund to defend the union's collective bargaining interest.

Like the litigation of Sherman Act allegations in the collective bargaining context, the task of measuring the challenged purchase-of-coal clause to determine whether it does or does not run afoul of the § 8(e) prohibition against "hot cargo" clauses would be a complex and difficult one. Moreover, in the context of a highly charged union-employer dispute like the one from which this controversy arises, that determination

> cannot be made without an inquiry into whether, under all the surrounding circumstances, the Union's objective was preservation of work for [Kaiser's] employees, or whether the [purchase-of-coal clause was] tactically calculated to satisfy union objectives elsewhere. . . . The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-a-vis his own employees. This will not always be a simple test to apply. (footnotes omitted.)

National Woodwork Manufacturers Association v. *N.L.R.B.*, 386 U.S. 612 at 644-645 (1967).[13] Thus, were Kaiser to prevail here, fund trustees who undertake, as Respondents did in this case, to collect delinquent contributions owed by contributing employers, would thereafter

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[13] That the test "will not always be . . . simple" is evidenced by the fact that *Woodwork Manufacturing Ass'n, supra*, produced one concurring opinion and a dissent in which four Justices joined.

be forced to defend a wide variety of union negotiating and organizing tactics. Presentation of those defenses would inevitably require inquiry into such areas as "the history of labor relations between the union and the employers . . . , and the economic personality of the industry." [14] Upon the strength and vigor of the trustees' presentation in such cases would turn determination of whether the challenged clause unlawfully pressured

> neutral employers and their employees, not involved in a labor dispute, . . . to assist a union in a dispute with another employer.

Amax Coal Company v. *N.L.R.B.*, 614 F.2d 872, 886 (3d Cir. 1980), rev'd on other grounds —— U.S. ——, 49 U.S.L.W. 4880 (June 29, 1981). It is precisely upon such determinations that the boundaries between permissible organizing and negotiating tactics and impermissible secondary activity are drawn. Thus, litigation of such questions clearly constitutes an extension of the collective bargaining process in which the parties to that process are able to test the validity and enforceability of positions they have adopted, and tactics they have employed, in direct dealings with one another.[15] In sum, we believe it self-evident that litigation of issues like those Kaiser attempted to raise in this case becomes every bit as much a part of the "industrial combat" between unions and employers as are the direct organizing and negotiating activity from which the litigation arises. The Trustees are not a cohort in the army of either the union or the employer and should not be dispatched to engage in the battle.

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[14] *Woodwork Mfrs. Ass'n, supra*, 386 U.S. at 645, n. 38.

[15] That the parties to the 1974 NBCWA recognized that their dispute over the "purchase-of-coal" clause was but one element of their collective bargaining relationship is clear. They specifically contemplated, in Article XX of that Agreement, the possibility that that dispute might produce both litigation between them and further negotiations.

III. THE STATUTORY MANDATE THAT FUNDS REMAIN NEUTRAL AND OPERATE FOR THE EXCLUSIVE BENEFIT OF PARTICIPANTS AND BENEFICIARIES WOULD BE MATERIALLY COMPROMISED IF TRUSTEES WERE REQUIRED TO RESPOND AS OPPONENTS TO THE ILLEGALITY DEFENSES.

A. The Law Strictly Obligates Fund Trustees To Act And To Expend Fund Assets In The Sole And Exclusive Interests Of Participants And Beneficiaries.

Beginning with enactment of § 302 of the LMRA, and continuing with enactment of ERISA and the MPPAA, Congress has carefully and consistently required that trustees of employee benefit plans act solely in the interests of plan participants and beneficiaries. In adopting the requirements and limitations specified in § 302(c)(5), Congress intended

> to deal with problems peculiar to collective bargaining. The provision was enacted as part of a comprehensive revision of federal labor policy . . . , and aimed at practices which Congress considered inimical to the integrity of the collective bargaining process.

Arroyo v. *United States*, 359 U.S. 419, 424-425 (1959). The solution fashioned by Congress "to deal with [these] peculiar . . . collective bargaining" problems was to permit employers to make payments to pension and welfare funds *only* if such funds were

(a) held in trust,

(b) administered by trustee boards on which unions and employers were equally represented,

(c) administered only in accordance with detailed written plans of benefits and contributions, and

> (d) administered "for the sole and exclusive benefit of employees . . . and their families and dependents . . ."

29 U.S.C. § 186(c)(5).[16] The language of § 302(c)(5) is thus carefully tailored to asure that employee trust funds could not be used in any way to influence or interfere with the process of collective bargaining; such funds could

> be established only for purposes which Congress considered proper and expended only for the purposes for which they were established.

Arroyo, supra, at 426.

Comprehensive Congressional revisitation in 1974 and 1980 of problems associated with operation of collectively bargained, jointly-trusteed pension funds leaves no room for doubt that Congress continues to adhere to its 1947 judgment that absolute removal of the operation of employee benefit trust funds from the collective bargaining arena was necessary. The comprehensive pension legislation adopted in 1974 not only continued, but substantially elaborated the fund and trustee constraints originally adopted in 1947. Thus, for example, Section 404(a) of ERISA requires that fund trustees, as fiduciaries, act solely in the interests of plan participants and beneficiaries,[17] while Section

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[16] Similarly, Section 401(a)(2) of the Internal Revenue Code of 1954 (IRC) requires that a trust fund must be used for no other purpose than the exclusive benefit of employees and their beneficiaries. Failure to meet such requirement can result in disqualification of a plan and disallowance of employer deductions for contributions. *See*, IRC section 404(a).

[17] 29 U.S.C. § 1104(a). The obligation to operate these funds for the "sole and exclusive benefit" of employees clearly prohibits the use of fund assets for or in the interest of either unions or employers. *See*, e.g., 93 Cong. Rec. 4876-77 (1947): "[U]nless we impose some restrictions we shall find that the . . . fund will become . . . a war chest for the . . . union . . ." (Remarks of Sen. Taft),

406(b)(2)[18] prohibits them from representing any interest adverse to that of the plan beneficiaries. Section 409(c)[19] provides that trustee breaches of their fiduciary obligations may result in assessment of personal liability against them.

The legislative history of ERISA confirms, moreover, that Congress specifically intended to prohibit fund trustees "from engaging in actions where there would be a conflict of interest with the fund, such as representing any party dealing with the fund." S. Rep. No. 93-383, 93d Cong., 1st Sess., pp. 31-32 (1973), and "from being put into a position where he has dual loyalties and therefore cannot act exclusively for the benefit of a plan's participants and beneficiaries." H.R. Conf. Rep. No. 93-1280, 93d Cong., 2d Sess., p. 309 (1974). The only way, of course, to assure the required neutrality, and to insure that trustees will, in fact, act solely in the interests of participants and beneficiaries, is completely to remove such funds from the competing pressures and demands necessarily generated by the collective bargaining process.

As this Court has unequivocally confirmed, that is precisely what Congress has done. In *NLRB* v. *Amax Coal Co., supra*, the Court was called upon closely to examine the permissible limits of the role of trustees of a § 302(c)(5) trust fund vis-a-vis the collective bargaining parties who sponsor the fund. The central issue in *Amax* was whether the employer-selected trustees of a Taft-Hartley trust fund are "representatives of the employer for purposes of collective bargaining or adjustment of grievances" within the meaning of § 8(b)(1)

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and section 403(c)(1) of ERISA; "[T]he assets of a plan shall never inure to the benefit of any employer . . . ." *Cf. Amax Coal Co., supra*, 49 U.S.L.W. at 4883, (1981).

[18] 29 U.S.C. § 1106(b)(2).

[19] 29 U.S.C. § 1109(c).

(B) of the National Labor Relations Act.[20] Addressing that issue, the Court found, on the basis of a comprehensive and detailed examination of the history and intent of § 302(c)(5) and ERISA, that the

> duties of an employer-appointed trustee of an employee benefit trust fund, under § 302(c)(5) of the Act, under principles long ago developed by the courts of chancery, and under specific provisions of ERISA, are totally alien to both [collective bargaining and adjustment of grievances].

Amax Coal Co., supra, 49 U.S.L.W. at 4885. The Court's examination of that controlling statutory framework compelled it to conclude instead

> that an employee benefit fund trustee is a fiduciary whose duty to the trust beneficiaries must overcome any loyalty to the interests of the party that appointed him . . .

Id., 49 U.S.L.W. at 4884.

> The management-appointed and union-appointed trustees do not bargain with each other to set the terms of the employer-employee contract; they can neither require employer contributions not required by the original collectively-bargained contract, nor compromise the claims of the union or the employer with regard to the latter's contributions.

Id.

Thus, in this Court's view, Congress has drawn clear, unmistakable distinctions between legitimate union-employer collective bargaining and trust fund administration. Whereas in collective bargaining each side is free within broad limits to negotiate, compromise, and ex-

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[20] Section 8(b)(1)(B) makes it an unfair labor practice for a union "to restrain or coerce . . . an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances. . . ." 29 U.S.C. § 158(b)(1)(B).

ert economic pressure on the other, none of those activities may properly play a role in the operation of employee benefit trusts. Particularly pertinent here is the Court's recognition that prominent among the statutory responsibilities of fund trustees is the responsibility to insure, through whatever means are necessary, that employer contributions owed to the fund are paid.

> Indeed, the trustees have an obligation to *enforce* the terms of the collective bargaining agreement regarding employee fund contributions against the employer "for the sole benefit of the beneficiaries of the fund." *United States* v. *Carter*, 353 U.S. 210, 220.

Amax Coal Co., supra, 49 U.S.L.W. at 4884. Trustees' ability to assure prompt and complete employer payment of all contributions owed is, of course, critical to maintenance of the funds' compliance with statutory minimum funding standards.[21] The Court in *Amax Coal Co., supra*, pointed out that one of Congress' principal purposes in adopting the 1980 MPPAA was

> to strengthen the funding requirements and enhance the financial stability of multiemployer pension plans[,]

Amax Coal, supra, 49 U.S.L.W. at 4885, n.22. by *inter alia*, assuring that fund trustees will have the ability to recover delinquent pension contributions quickly and effectively.[22]

As the Court noted in *Amax Coal*, moreover, trustees have no real choice in this matter. Any failure on the part of fund trustees diligently to pursue their obliga-

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[21] See § 302 of ERISA, 29 U.S.C. § 1082.

[22] See § 306(a) of the MPPAA, making any employer failure to pay contractually required pension contributions a violation of ERISA.

tion to collect delinquent contributions can constitute a breach of their statutory fiduciary obligation,[23] as well as an unlawful extension of credit to the delinquent employer.[24]

It is, in sum, abundantly clear that fund trustees may not engage in any of the adversary activity which characterizes collective bargaining without breaching the well defined Congressional mandates and constraints within which these funds, and their trustees, must operate.

B. Effective Implementation of Applicable Statutes and of Prior Decisions of the Courts Requires That An Absolute Rule Be Adopted Which Insulates Fund Trustees From Having To Abdicate Their Neutral Role.

As we have shown, *supra*, pp. 8-11, if Kaiser were to prevail here, Respondents and other trustees who, like them, administer § 302(c)(5) trusts, would inevitably be obliged to participate in substantive litigation which is for all practical purposes an extension of collective bargaining. It is equally clear, moreover, that such an eventuality would put § 302(c)(5) trustees in fundamental conflict with the constraints which Congress has fashioned for jointly-trusteed employee benefit trusts. The NCCMP believes that appropriate protection of those Congressional constraints, and of the particular role assigned to jointly-trusteed pension funds in the

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[23] See 29 U.S.C. § 1104(a).

[24] See, e.g., *Huge* v. *Old Home Manor, Inc.*, 419 F.Supp. 1019 (W.D. Pa. 1976); and *Rosen* v. *Hotel and Restaurant Pension Fund*, —— F.2d ——, 2 E.B.C. 1054 (3rd Cir. 1981). The suggestions of Kaiser (Brief at p. 27) and amicus Mid-America Legal Foundation (Brief, pp. 13-17) that adoption of Kaiser's position will enable collective bargaining parties to avoid unnecessary litigation in the future betrays, at best, a fundamental lack of comprehension of the requirements and constraints the law imposes upon fund trustees.

overall scheme of federal labor relations, requires that this Court unequivocally reject the position urged here by Kaiser.

The function which Congress has assigned to jointly-trusteed employee benefit trusts has long been recognized by this Court. More than twenty years ago, the Court found that certain modifications in the otherwise applicable common law principles of contract and agency were necessary regarding § 302(c)(5) trusts if such trusts were fully to effectuate the purposes for which they are created. In *Lewis* v. *Benedict Coal Corporation*, *supra*, the Court was confronted with an employer's claim that the employer was entitled to reduce the amount of its contractual liability to the jointly-trusteed pension and welfare funds in which it participated, on account of damages it had allegedly sustained as a result of union conduct claimed to be unlawful. In substance, the employer's theory in *Benedict Coal*, like Kaiser's theory here, was that the union and the fund were merely each other's *alter ego*, and that the employer's liabilities to, and claims against, each were fungible.

The Court disagreed. Formulating the principles which we believe are controlling here, the Court reasoned that a collective bargaining agreement providing for the establishment of a § 302(c)(5) trust

> is not a typical third party beneficiary contract. The promisor's interest in the third party . . . goes far beyond the mere performance of its promise to that third party, i.e., beyond the payment of royalty. It is a common place of modern industrial relations for employers to provide security for employees and their families to enable them to meet problems arising from unemployment, illness, old age or death. . . . Not only has Benedict entered into a long term relationship with the union [in the creation of a jointly-sponsored welfare fund], but in compliance

> with § 302(c)(5)(B) *it has assumed equal responsibility with the union for the management of the fund.* (emphasis added.)

Id., 361 U.S. at 468. The Court observed further that the contributions any employer agrees to pay to such a fund are fully as much a component of his employees' agreed-upon compensation as are the employees' wages. In the Court's view, the employer could neither have recovered directly from the employees any damages allegedly suffered at the hands of the union, nor attempted to recoup those damages by withholding employees' future wages. The Court found no reason to permit assets of the fund, held in trust for the exclusive benefit of the employees, to be any more vulnerable to such a claim than were assets personally held by, *or owed to*, its employees individually.

Kaiser's contrary suggestion notwithstanding, we believe the *Benedict Coal* analysis is directly applicable here. The reasoning which informed the Court's refusal to permit the delinquent employer to take a set-off against the contributions it owed the fund removes any rational basis for permitting Kaiser, or any other delinquent contributing employer, to interpose and litigate its claims of alleged union misconduct in defense of its own failure to pay its agreed-upon fund contributions. For since fund assets are, in truth, assets of the employees, which must be held by the trustees for the employees' sole and exclusive benefit, those assets may *never* be relied upon to satisfy employer claims against the union.[25] That being so, there is no justification for com-

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[25] *See* § 301(b) of the LMRA, 29 U.S.C. § 185(b), which provides that a money judgment entered against a union may be enforced *only* against the assets of the union "as an entity". The *Benedict Coal* Court found the policy evidenced by this limitation to apply "with even greater force to protecting the interests of beneficiaries of the welfare fund . . . ." *Benedict Coal Co., supra*, 361 U.S. at 470.

pelling a fund or its trustees to mount a defense of union conduct which the employer claims to be illegal.

The procedural history of both *Benedict Coal*, *supra*, and *Pennington*, *supra*, are, we believe, particularly instructive. Like the case now before the Court, both *Benedict Coal* and *Pennington* began as simple collection cases. In each case, the employer conceded, in response to the trustees' complaint, that the agreement it had executed with the union obligated it to pay contributions to the fund. And in each the employer contended that those obligations were excused by reason of illegal pressures or other unlawful conduct by the union, and because, in *Pennington*, the agreements were allegedly part of an illegal conspiracy in violation of Sections 1 and 2 of the Sherman Act between the union and "certain large coal producers".

Unlike Kaiser Steel, however, the employers in both *Benedict Coal* and *Pennington* impleaded the union in the action and cross-claimed for the damages said to have resulted from the union's misconduct. Unlike Kaiser Steel, therefore, both those employers were required to litigate their damage claims directly against the party whose conduct they alleged to have caused the damage.

The focus of this Court's review in *Benedict Coal*, *supra*, was, as we have noted, whether the trust fund could be held partially liable by way of an employer set-off, for allegedly union-inflicted damage. In *Pennington*, *supra*, however, relying on the trial court's finding of fact that the trustees had not participated in any of the arguably unlawful conduct with which the union had been charged, the Court of Appeals, citing this Court's opinion in *Benedict Coal*, held that neither the Sherman Act violations charged to the union nor the claimed illegality of the contract itself operated to bar the trustees' right to recover the royalty payments defendant

had agreed to make. *Pennington* v. *United Mine Workers*, 325 F.2d 804, 818-819 (6th Cir. 1963), rev'd *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965). And whereas the *antitrust* issues in the case, which had been vigorously litigated between the employer and the union—the principal parties to that dispute—were subsequently fully considered by this Court,[26] no further review was sought of the Court of Appeals' refusal to excuse the employer's obligation to contribute to the fund.

It is true that, until recently, the result commanded by *Benedict Coal* has generally prevailed. That is, delinquent contributing employers who have attempted to defend trustee collection actions by showing union illegality have generally been unsuccessful.[27] It is also generally true, however, that reported decisions on this point do not reflect any particular analytical consensus. Instead, the lower courts have generally approached these cases, as Kaiser urges this Court to do, by analyzing Sherman Act illegality claims as antitrust, rather than pension, cases, and unfair labor practice claims as preemption, rather than pension, cases. In our view, that approach fails to account for the special constraints and

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[26] *United Mine Workers* v. *Pennington*, *supra*, 381 U.S. 657 (1965). Presumably, had Kaiser had a genuine interest in testing the illegality claims raised below it would have followed the employers' leads in *Benedict Coal* and *Pennington* by impleading the union and alleging a Sherman Act cross-claim against it. Kaiser's obvious reluctance to direct such a claim against the only party who can logically be required or expected to defend it illustrates, we believe, that its real motive here is something other than a desire to determine the legal implications of the purchase-of-coal clause.

[27] *See, e.g.*, in addition to the decisions below in this case, *Huye* v. *Long's Hauling Co.*, 590 F.2d 457 (3rd Cir. 1978), *cert. denied*, 442 U.S. 918 (1979); *Waggoner* v. *R. McGray, Inc.*, 607 F.2d 1229 (9th Cir. 1979); *Waggoner* v. *Northwest Excavating, Inc.*, —— F.2d ——, 2 EBC 1356 (9th Cir. 1981).

special responsibilities which characterize jointly-trusteed funds. It carries with it, moreover, not only the danger of improperly involving fund trustees in substantive labor-management litigation, but also the real risk of producing inconsistent results in cases which are conceptually identical.[28]

It was, we suggest, precisely to preclude this possibility, and to assure that fund trustees would be able readily to enlist the aid of the courts in their efforts to collect delinquent employer contributions, that Congress in 1980 enacted § 306 of the MPPAA. As we have noted, *supra*, p. 16 n.22, § 306(a) added a new § 515 to ERISA, 29 U.S.C. § 1145, under which the statute itself is violated by any employer who fails to make the contribution payments he has agreed to make. The purpose of the new § 515 was described by one of the bill's chief sponsors in the Senate in the following terms:

> Some simple collection actions brought by plan trustees have been converted into lengthy, costly, and complex litigation concerning claims and defenses unrelated to the employers' promise and the plans' entitlement to the contributions. This should not be

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[28] Three district courts have, in fact, permitted employers to plead, and prove, claims of alleged violations of § 8(f) of the NLRA, 29 U.S.C. § 158(f), in successful defense against trustee contribution collection actions. *Washington Area Carpenter's Welfare Fund* v. *Overhead Door Co. of Metropolitan Washington*, 488 F.Supp. 836 (D.D.C. 1980) appeal pending but ordered deferred pending decision of the case at bar by this Court, No. 80-1501, D.C. Cir., June 12, 1981; *Contractors, Laborers, Teamsters, and Engineers Health and Welfare Plan* v. *Associated Wrecking Co.*, 484 F.Supp. 582 (D. Neb. 1980), rev'd. on substantive grounds that absence of the majority status does not preclude enforcement of pre-hire agreement's fringe benefit provisions, but not addressing whether lack of majority support may be raised as a defense by an employer, 638 F.2d 1128 (8th Cir. 1981). Also, *Western Washington Laborers-Employers Health and Security Trust Fund* v. *McDowell*, —— F. Supp. ——, 103 LRRM 2219 (W.D. Wash. 1979), appeal pending No. 80-3024, 9th Cir., Jan. 11, 1980.

> the case. . . . Sound national pension policy demands that employers who enter into agreements for pension contributions not be permitted to repudiate their pension promises.
>
> In this regard we endorse judicial decisions such as *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 549 (1960) . . . and *Huge* v. *Long's Hauling Co., Inc.*, 590 F.2d 457 (3d Cir. 1978). Cases such as *Western Washington Laborers-Employers Health and Security Trust Fund* v. *McDowell*, F. Supp., 103 LRRM 2219 (W.D. Wash. 1979) and *Washington Area Carpenters Welfare Fund* v. *Overhead Door Company*, C.A. No. 79-0097, U.S.D.C.D.C., . . . are considered to have been incorrectly decided.

126 Cong.Rec. S. 11673 (daily ed., August 26, 1980). The Congressional design, reaffirmed by enactment of the MPPAA, could not be clearer: in Congress' considered judgment, national pension policy precludes judicial cognizance in contribution collection suits of employer defenses based upon or arising from the collective bargaining relationship.

Nevertheless, Kaiser now invites the Court to ignore or repudiate the firm command of *Benedict Coal, supra*, and *Amax, supra*, and the unmistakable evidence of Congress' clear intent to insulate fund assets and fund trustees from the battles of collective bargaining. If Kaiser prevails here, not only will employers continue to find it expedient to refuse to pay previously agreed upon fund contributions, but fund trustees, who are obligated by law to sue for delinquent contributions, will be forced to become increasingly involved in the litigation of labor-management disputes.

Because the resultant involvement of the fund directly into the union-employer battle is so fundamentally inconsistent with the Congressional mandate of fund neutrality; because the inevitable expenditure of fund assets in defense of union tactics or conduct cannot be reconciled with the Section 302(c)(5) and ERISA "sole and ex-

clusive benefit" rules; and because the *Benedict Coal* mandate that employers may not look to employee benefit fund assets in satisfaction of any claim arising from union conduct cannot be reconciled with the position Kaiser urges here, we believe, with Circuit Judge Adams, that

> it [is] desireable to have a clear rule that would foreclose such litigation altogether[.]

Huge v. *Long's Hauling Co., Inc.* 590 F.2d 457, 463 (3d Cir. 1978) (Adams, J., concurring), *cert. denied* 442 U.S. 918 (1979).

Adoption of such a rule is, we believe, critical. For only such a holding will preclude employers who agree, as part of a collective bargaining agreement with a union, to make pension or welfare contributions to a trusteed fund from asserting "*any* defenses that [they] may arguably have to that contract[,]" *Long's Hauling Co., supra*; 590 F.2d at 463 (Adams, J., concurring), when the trustees sue to collect those contributions. Only by adopting such a rule, and thus giving full and meaningful effect to the unmistakable Congressional intent evidenced, most recently, in the MPPAA, can this Court assure that fund trustees will no longer be required to fight union-employer fights in order to collect delinquent contributions. Thus, employers will no longer be tempted, as Kaiser Steel was, to hold agreed upon pension contributions hostage to their partisan efforts at improving their own position in representation and collective bargaining relationships with their employees' union.

CONCLUSION

For all the reasons set forth above, the NCCMP respectfully urges the Court to affirm the ruling of the Court of Appeals in this case.[29]

Respectfully submitted,

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[29] Our failure to address the question designated "3" in Kaiser's petition is not to be construed as supporting the view expressed by Kaiser. To the contrary, we associate ourselves with the position taken by the Respondents with respect to attorneys' fees in this case and, further, believe that the issue was resolved for all such claims when Congress enacted the MPPAA, see § 306(b), P.L. 96-364 amending 29 U.S.C. § 1132(g), making attorneys' fees in successful delinquency actions a statutory right.